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OFFICE OF PERSONNEL MANAGEMENT

5 CFR Parts 212, 213, 302, and 930

RIN 3206-AN72

Administrative Law Judges

AGENCY: Office of Personnel Management.

ACTION: Proposed rule with request for comments.

SUMMARY: The Office of Personnel Management (OPM) is issuing proposed regulations governing the appointment and employment of administrative law judges (ALJs). The proposed rule will implement Executive Order (E.O.) 13843 titled “Excepting Administrative Law Judges from the Competitive Service.” These proposed revisions update the rules for ALJ hiring in light of the new Schedule E of the excepted service for ALJs and update the existing ALJ employment regulations to reflect other recent changes in the law.

DATES: Comments must be received on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

ADDRESSES: You may submit comments, identified by document number and/or Regulation Identification Number (RIN) “3206-AN72” and title using any of the following methods:

Federal Rulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments. All submissions received through the Portal must include the agency name and docket number or RIN for this rulemaking.

Instructions: All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this rulemaking. All comments received will be posted without change to [regulations.gov](https://www.regulations.gov), including any personal information provided.

Docket: For access to the docket to read background documents or comments received, go to [regulations.gov](https://www.regulations.gov).

FOR FURTHER INFORMATION CONTACT: Roseanna Ciarlante by telephone at (267) 392-8640 or Katika Floyd by telephone at (202) 606-0960; by e-mail at employ@opm.gov; by fax at (202) 606-4430; or by TTY at (202) 418-3134.

SUPPLEMENTARY INFORMATION:

Background and Authority for this Rulemaking

ALJs serve as independent impartial triers of fact in formal proceedings requiring a decision on the record after the opportunity for a hearing. In general, ALJs prepare for and preside at formal proceedings required by statute to be held under or in accordance with provisions of the Administrative Procedure Act (APA), codified, in relevant part, in sections 553 through 559 of title 5, United States Code (U.S.C.). ALJs rule on preliminary motions, conduct pre-hearing conferences, issue subpoenas, conduct hearings (which may include written and/or oral testimony and cross-examination), review briefs, and prepare and issue decisions, along with written findings of fact and conclusions of law.

The Federal Government employs ALJs in a number of agencies throughout the United States. Previously, appointments to the position of ALJ have been made through competitive examination and competitive service selection procedures.¹ As recognized by the Supreme Court in *Lucia v. Securities and Exchange Commission*, 138 S. Ct. 2044 (2018) at least some ALJs are “inferior Officers” of the United States and thus subject to the Constitution’s

¹ In the competitive service, individuals must go through a competitive process (i.e., competitive examining) which is open to all applicants. This process may consist of a written test, an evaluation of the individual's education and experience, and/or an evaluation of other attributes necessary for successful performance in the position to be filled. *See e.g.*, 5 U.S.C. 2102 and 3304; 5 CFR 2.1(a) and 300.102.

Appointments Clause, which governs who may appoint such officials. In accordance with the Constitution, in such instances, Congress has vested the appointment of ALJs in the heads of departments or agencies. Although such department or agency head may rely on agency human resource officials or other staff to assess applications, conduct interviews, and the like, the final appointment must be made or approved by the department or agency head; this authority cannot be delegated. On July 10, 2018, the President signed Executive Order (E.O.) 13843 titled, “Excepting Administrative Law Judges from the Competitive Service” (83 FR 32755). E.O. 13843 states “that conditions of good administration make necessary an exception to the competitive hiring rules and examinations for the position of ALJ. These conditions include the need to provide agency heads with additional flexibility to assess prospective appointees without the limitations imposed by competitive examination and competitive service selection procedures.” Section 2 of the Executive Order specifies that all appointments of administrative law judges made on or after July 10, 2018 must be made under Schedule E of the excepted service.² Section 3(a) of the Executive Order amended Civil Service Rule VI to shift new hiring of ALJs from the competitive to the excepted service.

Section 3(b) of the Executive Order directed OPM to issue transitional guidance, and OPM issued explanatory guidance on the E.O. on July 10, 2018. *See* OPM Memorandum to Heads of Departments and Agencies, Executive Order – Excepting Administrative Law Judges from the Competitive Service, *available at* <https://chcoc.gov/transmittals>. OPM later issued

² Excepted service positions in the Executive Branch of the Federal Government are positions that are specifically excepted from the competitive service by or pursuant to statute, by the President, or by the Office of Personnel Management, and are not in the Senior Executive Service. *See* 5 U.S.C. 2103.

more specific guidance to agencies on the ALJ loan program (August 1, 2018), on promotions and reassignments of ALJs (August 27, 2018), and on the termination of the ALJ register and discontinuance of the ALJ examination (Sept. 20, 2018). OPM published a Fact Sheet: Administrative Law Judge (ALJ) Positions on August 19, 2019, available at <https://www.opm.gov/services-for-agencies/administrative-law-judges/fact-sheet-administrative-law-judge-alj-positions-posted.pdf>.

Section 3(b) of the Executive Order also directed OPM to “adopt such regulations as the Director determines may be necessary to implement this order, including, as appropriate, amendments to or rescissions of regulations that are inconsistent with, or that would impede the implementation of, this order, giving particular attention to 5 CFR part 212, subpart D; 5 CFR part 213, subparts A and C; 5 CFR 302.101; and 5 CFR part 930, subpart B.” OPM is proposing rules for the newly created Schedule E hiring of ALJs. The proposed regulations make several significant changes to the recruitment, appointment, and movement of ALJs based on E.O. 13843 and formalize OPM’s prior explanatory guidance. As described in detail below, OPM is also proposing other changes to comply with other recent changes in the law.

OPM is proposing these regulations pursuant to this instruction, the Civil Service Rules, and OPM’s own statutory authority to regulate the ALJ program, which includes, *inter alia*, sections 1103(a)(5)(A), 1305, 3323(b)(2), and 5372(c) of title 5, U.S.C.

Summary of the Proposed Changes

Removal of References to the Competitive Examination.

In light of the Executive Order, OPM terminated the ALJ competitive service register, its centralized list of eligible ALJ applicants, as the Executive Order ended the need for competitive examination, rating and ranking, and selection from competitive certificates of eligibles issued

by OPM. Therefore, OPM proposes to remove references to the ALJ competitive examination throughout subpart B of 5 CFR part 930.

In particular, the text of the current regulations recites that ALJs are appointed in the competitive service and that OPM is responsible for examining ALJ candidates and producing registers of qualified ALJ applicants from which agencies make selections in accordance with the provisions of subpart B of 5 CFR part 930. The proposed rule aligns the text of OPM's regulations to the changes the President effected through E.O. 13843. The proposed rule changes reflect that OPM will no longer conduct recruitment and competitive examinations of ALJ candidates for employment in Federal agencies, and that agencies will no longer select ALJ candidates from competitive certificates of eligibles issued by OPM.

Excepted Appointments of ALJs.

As noted above, the proposed rule removes references to appointments in the competitive service. Instead, the proposed rule, conforming to E.O. 13843, recites that any ALJ selected (with the application of veterans' preference as far as administratively feasible) on or after July 10, 2018, must be appointed by the head of the hiring agency³ and placed in an ALJ position in the excepted service. Consistent with Civil Service Rule VI, as amended by section 3(a) of the E.O., the proposed rule creates a new Schedule E in the excepted service specific to ALJs, except that an individual encumbering an ALJ position in the competitive service on July 10, 2018, shall remain in the competitive service while he or she remains in the position (and will continue to be subject to the same conditions pertaining to appointment in the competitive service).

Recruitment.

³ Generally, under *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 512-13 (2010), the "agency head" of a multi-member board, commission, or authority is the full body acting collectively, not its chair or a single member. Agencies with questions should seek the advice of the Department of Justice.

OPM's current regulations do not address requirements for job opportunity announcements for ALJs, because the requirements for job opportunity announcements for competitive service positions generally are set forth in 5 U.S.C. 3330 and in 5 CFR part 330, subpart A. OPM's August 17, 2019 transitional guidance explains that although the excepted service has no requirement to post a USAJOBS announcement or to follow the job posting requirements for competitive service positions, the merit system principles (5 U.S.C. 2301) apply to excepted service recruiting. Accordingly, agencies should tell potential applicants about ALJ vacancies, recruit in a manner to attract a sufficient pool of qualified applicants, and recruit in a manner that allows all qualified and eligible employees to apply for higher-level positions.

OPM proposes to codify this guidance in the regulations. We note that this is consistent with E.O. 11478 of August 8, 1969, as amended, Equal Opportunity in the Federal Government, 42 U.S.C. 2000e note and similar to Administrative Conference Recommendation 2019-2, Agency Recruitment and Selection of Administrative Law Judges (para. 1), 84 FR 38927, 38930-31 (Aug. 8, 2019).

Movement between Agencies or Appointment after a Period of Separation.

OPM is proposing through this rule that an ALJ serving in the competitive service who accepts a new ALJ appointment at another agency on or after July 10, 2018, moves from the competitive service to an ALJ position under Schedule E of the excepted service, instead of transferring to another competitive service position. Likewise, a former ALJ who held a position in the competitive service prior to separation cannot be reinstated to an ALJ position in the competitive service, and must be given a new excepted appointment. The proposed rule recognizes that transfer and reinstatement are no longer available for ALJ appointments because

these actions are exclusively competitive service appointment methods and accordingly, are no longer available for ALJ appointments.

Qualifications of ALJs in the Excepted Service.

Section 1 of the E.O. states that excepting the position of ALJ from the competitive service “will give agencies greater discretion to assess critical qualities in ALJ candidates, such as work ethic, judgment, and ability to meet the particular needs of the agency,” and to conduct assessments “without proceeding through complicated and elaborate examination processes and rating procedures that do not necessarily reflect the agency’s particular needs.”

Under the proposed rule, the heads of agencies, not OPM, are authorized to assess prospective appointees for ALJ positions in their respective agencies without consideration of the competitive hiring rules and examination process. This provides agency heads with greater flexibility to assess critical qualities in ALJ applicants and determine whether an ALJ applicant meets the particular needs of the hiring agency. Appointments of ALJs are made pursuant to Schedule E of the excepted service, but are not subject to the provisions of OPM’s regulations in 5 CFR part 302 governing appointments in the excepted service, including examination and rating requirements. However, an agency head must apply the principle of veterans’ preference “as far as administratively feasible” when filling ALJ positions.

Civil Service Rule VI, as amended by section 3(a) of the E.O., adopts, as a “minimum standard of appointment to the position of administrative law judge,” the bar licensure requirement that OPM previously prescribed through regulation in 5 CFR 930.204(b), and permits “additional agency requirements” for qualifications “where appropriate.” This means the minimum qualification and licensure requirement for an ALJ position is the possession of a professional license to practice law and being authorized to practice law under the laws of a

State, the District of Columbia, the Commonwealth of Puerto Rico, or any territorial court established under the United States Constitution at the time of selection and any new appointment (other than of an incumbent ALJ to another ALJ position). Judicial status is acceptable in lieu of “active” status in States that prohibit sitting judges from maintaining “active” status to practice law, and being in “good standing” also is acceptable in lieu of “active” status in States where the licensing authority considers “good standing” as having a current license to practice law.

The proposed rule therefore continues only the existing bar licensure requirement as the minimum standard for appointment and explains that agency heads may prescribe additional requirements as appropriate.

Effect of a Promotion or Reassignment.

E.O. 13843 provides that “[a]ppointments of ALJs shall be made under Schedule E of the excepted service,” but that “[i]ncumbents of this position who are, on July 10, 2018, in the competitive service shall remain in the competitive service as long as they remain in their current positions.” Thus, as long as an ALJ in the competitive service on July 10, 2018, remains in the position of ALJ, and does not require a new appointment, he or she remains in the competitive service. Under generally-applicable regulations, the internal reassignment or promotion of an officer or employee by his or her agency involves only a position change, and does not involve a new appointment under civil service law. 5 CFR 210.102; *see also* 5 CFR 335.101. This rule also applies to ALJs as well as employees in other pay systems. *See* 70 FR 75745, 75746 (Dec. 21, 2005). Therefore, under the proposed rule, and consistent with OPM’s transitional guidance, an ALJ reassigned or promoted within his or her agency remains in the competitive service, as long as he or she remains an ALJ. In this circumstance, an agency must process and record the

personnel action as a reassignment or promotion in the competitive service, not as an appointment in the excepted service.

However, because some ALJs were deemed to have constitutional status as inferior officers of the United States under the Supreme Court's decision in *Lucia v. Securities and Exchange Commission*, OPM's transitional guidance instructed agencies that where a promotion or reassignment would involve a significant position change, such as a promotion to a position classified at a higher level (AL-1 or AL-2), a reassignment to a different bureau within the same department, or a reassignment to perform a significantly different kind of work (e.g., a change from presiding over *ex parte* cases to presiding over trials, or from adjudicating benefits cases to adjudicating regulatory enforcement cases), the agency's request for OPM to approve the action must document that the head of the requesting agency approved the promotion or reassignment. OPM's transitional guidance further instructed that this documentation is not necessary for routine geographic reassignments, or for the advancement of an ALJ's rate within pay level AL-3. This documentation requirement also does not require a change in the ALJ's status from the competitive service to the excepted service. The proposed rule formalizes these instructions.

Pay and Position Classification.

ALJ pay administration and position classification are governed by 5 U.S.C. 5372, which assigns responsibility to OPM and makes no distinction between competitive service and excepted service ALJs. The proposed rule, therefore, makes no distinction between competitive and excepted service ALJs with respect to OPM's pay administration and position classification responsibility.

Adverse Actions and Personnel Vetting Requirements.

Adverse actions against ALJs are governed by 5 U.S.C. 7521, subject to regulations issued by the Merit Systems Protection Board (MSPB) under 5 U.S.C. 1305. These provisions likewise make no distinction between competitive service and excepted service ALJs. Therefore, under the proposed rule, the MSPB procedures prescribed in 5 U.S.C. 7521 and 5 CFR part 1201 will apply to an agency action to remove, suspend, reduce in level, reduce pay, or furlough for 30 days or less an ALJ in the competitive or excepted service (i.e., adverse action).

The current regulations provide that appointment as an ALJ is subject to the competitive service suitability requirements in 5 CFR part 731. OPM is amending these requirements due to changes in the law since the provisions were last amended in 2007. First, E.O. 13764 of January 23, 2017 amended Civil Service Rules II and V, authorizing OPM to prescribe minimum standards of fitness of character and conduct for excepted service appointments, and to require such appointments to be subject to a risk-based position designation and a corresponding background investigation under OPM-prescribed standards. E.O. 13764 also amended Civil Service Rule VI to make excepted service appointments “subject to the suitability and fitness requirements of the applicable Civil Service Rules and Regulations,” namely, Civil Service Rules II and V. (E.O. 13843 subsequently acknowledged that this requirement applies to “the position of administrative law judge.”) Finally, E.O. 13764 amended an earlier executive order, E.O. 13467 of June 30, 2008, to give the Director of National Intelligence, as the Security Executive Agent, the authority to prescribe investigative, adjudicative, and continuous vetting requirements for eligibility for access to classified information and for employment in a sensitive position; and to give the Director of OPM, as the Suitability and Credentialing Executive Agent, the authority to do the same for suitability, fitness, and eligibility for an identity credential. The Executive Order assigns this responsibility to ODNI and OPM for both competitive and excepted

service positions, including, *inter alia*, ALJ positions. The proposed rule incorporates these changes.

OPM's current regulations state that a removal or other action against an ALJ on grounds of suitability under part 731 is not subject to the statutory removal procedure in 5 U.S.C. 7521. OPM is eliminating this provision. In *Archuleta v. Hopper*, 786 F.3d 1340 (Fed. Cir. 2015), the Court of Appeals for the Federal Circuit ruled that, where an employee is covered by the statutory removal procedure in 5 U.S.C. chapter 75, subchapter II, that procedure governs his or her removal even if it is on grounds of suitability under the Civil Service Rules and OPM's regulations in 5 CFR part 731, because (at the time of the court's decision) the definition of an "adverse action" in 5 U.S.C. 7512 did not explicitly exclude a suitability action. Subsequently, in section 1086 of Public Law 114-92, the National Defense Authorization Act for FY 2016, Congress amended 5 U.S.C. 7512 to explicitly exclude an OPM suitability action from the definition of an adverse action in 5 U.S.C. 7512. Accordingly, suitability-based removals of employees who are covered by subchapter II are not subject to the statutory adverse action procedures. However, Congress did not make a corresponding amendment to 5 U.S.C. 7521, defining an "adverse action" for purposes of 5 U.S.C. chapter 75, subchapter III, which covers ALJs. Thus, while an ALJ may be subject to an unfavorable suitability determination, the removal action should follow the statutory procedure. The proposed rule retains references to other exceptions to 5 U.S.C. 7521 that have been prescribed by statute.

OPM's current regulation describes the use of administrative leave when an adverse action is pending. The Administrative Leave Act of 2016, section 1138 of Public Law 114-328, established new types of paid non-duty status in 5 U.S.C. 6389a and 6389b, namely, notice leave and investigative leave. OPM proposes to update the regulation to reflect this change. OPM has

proposed separate rulemaking to implement the Administrative Leave Act, at 82 FR 32263 (July 13, 2017).

Performance Ratings, Awards, and Incentives.

The regulations in 5 CFR 930.206 currently provide that an agency may not rate the job performance of an ALJ and may not grant any monetary or honorary award or incentive under 5 U.S.C. 4502, 4503, 4504, or any other authority, to an ALJ. Sections 1305 and 4305 of title 5, U.S.C. give OPM the responsibility to regulate the statutory prohibition on appraising the performance of ALJs -- found in 5 U.S.C. 4301(2)(D) -- without regard to whether ALJs are in the competitive service or the excepted service. Accordingly, under the proposed rule, the prohibition against rating the job performance of an ALJ remains in effect for ALJs in the competitive and excepted service.

OPM proposes revisions to this section, however, to clarify the incentives and similar payments for which an ALJ, whether in the competitive or excepted service, is ineligible. Specifically, the proposed rule clarifies that an ALJ is not eligible for recruitment, relocation, or retention incentives under 5 U.S.C. 5753 and 5754 because the regulations in 5 CFR part 575, subparts A, B, and C, require an eligible employee to have or maintain a rating of record of at least “Fully Successful” or equivalent to receive an incentive. Similarly, the proposed rule further establishes that ALJs are not eligible for the student loan repayment program because, under 5 U.S.C. 5379(d)(2) and 5 CFR 537.108(a)(2), an employee must maintain an acceptable level of performance to receive student loan repayment benefits. An ALJ cannot meet the requirements for these incentives and payments because an agency may not rate the job performance of an ALJ in either the competitive or excepted service.

ALJ Loan Program

In accordance with 5 U.S.C. 3344, OPM administers an Administrative Law Judge Loan Program that coordinates the loan/detail of an administrative law judge from one agency to another. Section 3344 makes no distinction between competitive service and excepted service ALJs. The proposed rule, like OPM's transitional guidance, makes clear OPM continues its responsibilities under this Program whether ALJs are in the competitive or excepted service. However, because some ALJs were deemed to have constitutional status as inferior officers of the United States under the Supreme Court's decision in *Lucia*, OPM's transitional guidance instructed agencies that, upon accepting the services of a loaned ALJ, the receiving agency must provide to OPM, as soon as practicable, documentation that the head of that agency made, approved, or ratified the loan of the ALJ. Likewise, the agency lending the ALJ must provide OPM with documentation that the ALJ's appointment was originally made or approved, or later ratified, by the head of that agency. This documentation requirement does not require a change in the ALJ's status from the competitive service to the excepted service. The proposed rule formalizes these instructions.

Senior ALJ Program.

The Senior ALJ Program allows retired ALJs to be reemployed on a temporary or irregular basis to complete hearings of one or more specified case(s). Upon appointment, and while reemployed, the retired ALJ is referred to as a Senior ALJ. The proposed rule clarifies that an agency that temporarily reemploys a retired ALJ must use the newly created Schedule E excepted service appointment. It also clarifies that Senior ALJs appointed prior to July 10, 2018 remain in the competitive service for the duration of their appointment, including any extension periods authorized by OPM. OPM approval procedures have not otherwise changed with respect to reemploying retired ALJs, since the statute governing the Senior ALJ Program, 5 U.S.C.

3323(b)(2), assigns program responsibility to OPM and makes no distinction between competitive service and excepted service senior ALJs after they have been appointed.

Reduction in Force.

The proposed rule amends the ALJ reduction in force (RIF) regulations currently described at 5 CFR 930.210. When implementing a reduction in force, the provisions in this section are a supplement to the RIF provisions in 5 CFR part 351 that have separate provisions for the treatment of competitive service and excepted service positions. The existing rule, which references part 351, makes clear that competitive service ALJs are subject to the provisions of 5 CFR part 351 that apply to competitive service employees and that excepted service ALJs are subject to the provisions of 5 CFR part 351 that apply to excepted service employees.

The proposed amendment establishes procedures for placement assistance for ALJs reached in an agency's reduction in force for those in both the competitive and excepted service. Under the proposed changes, an agency is required to establish an administrative law judge priority reemployment list and provide consideration to ALJs on its administrative law judge priority reemployment list before it may consider candidates on its regular employment lists, with certain exceptions.

Summary of Proposed Changes by Section.

Changes proposed for 5 CFR part 212:

We propose to amend the authority citation to add a reference to E.O. 13843. OPM is retaining the existing reference to E.O. 10577, but adding a corresponding reference to 5 CFR part 6. From 1954 until the early 1980s, the organic Civil Service Rules were set forth in E.O. 10577 and amended from time to time by the President. However, in recent decades, the practice has been for the President to amend the Civil Service Rules and, at the same time, directly amend

a corresponding part in chapter I, subchapter A of title 5, Code of Federal Regulations without also further amending E.O. 10577. Since the Civil Service Rules are the product of both of these methods of presidential rulemaking, both E.O. 10577 and the corresponding part in 5 CFR chapter I, subchapter A should be cited as authority for OPM's regulation.

Proposed § 212.401(b) adds the newly established Schedule E in the excepted service to the list of Schedules already in the rule. This provides that an employee in the competitive service at the time his or her position is first listed in schedule A, B, C, or E remains in the competitive service while occupying the position.

Changes proposed for 5 CFR part 213:

The authority citation is revised to include E.O. 13843 and 5 CFR part 6, and to correct the citation to E.O. 13562.

Subpart A of 5 CFR part 213 *General provisions* is revised to include the Schedule E authority in § 213.102, and to clarify that appointments to Schedule E must be made on a permanent basis in accordance with part 930.

Subpart C of 5 CFR part 213 *Excepted schedules* is revised by establishing Schedule E as a new schedule in part 213. Proposed § 213.3501 is labeled "Positions of administrative law judge appointed under 5 U.S.C. 3105." This proposed section explains the reasoning and basis for appointments under Schedule E and requires that all appointments of ALJs on or after July 10, 2018 must be made under this excepted service authority in accordance with the provisions in subpart B of 5 CFR part 930.

Changes proposed for 5 CFR part 302:

The authority citation is revised to include references to 5 U.S.C. 3317, 3318, and 3320 (in accordance with recent case law arising in a different context, *see* 81 FR 86290, 86291 (Nov. 30, 2016)), and to E.O. 13843 and 5 CFR part 6.

We propose to add ALJs to the list of positions in § 302.101(c) that are exempt from the appointment procedures of 5 CFR part 302, and for which agencies shall apply the principle of veterans' preference as far as administratively feasible.

Changes proposed for 5 CFR part 930:

The proposed rule makes extensive changes to 5 CFR part 930.

The proposed rule revises the authority citation for subpart B of part 930 by adding references to E.O. 13843 and 5 CFR parts 2, 5, and 6, as well as to 5 U.S.C. 1103(a)(5)(A) (OPM's general substantive rulemaking authority) and 5 U.S.C. 4305 (which, together with 5 U.S.C. 1305, authorizes OPM to regulate the exception from performance appraisals for ALJs).

The proposed rule deletes, from the authority citation, references to 5 U.S.C. 1104(a) (pertaining to the ALJ examination) and 1302(a) (pertaining to competitive examinations).

Proposed § 930.201 is revised throughout to add references to the excepted service. Paragraph (b) is revised to make clear that, as of July 10, 2018, appointments of ALJs must be made under Schedule E of the excepted service in § 213.3501. Paragraph (c) makes clear that ALJs appointed prior to July 10, 2018, remain in the competitive service as long as they remain in their positions, including when they are subject to actions within their agencies that do not result in a new appointment (including details, assignments, reassignments, pay adjustments, and promotions). The proposed rule also states that no new appointments of ALJs may be made to the competitive service after July 9, 2018. Paragraph (e) establishes OPM's authority with respect to the ALJ program. This paragraph is revised to delete references to OPM's authority to

recruit and examine ALJ applicants, to approve transfers and reinstatements to competitive service positions, and to maintain a central priority reemployment list, and to clarify that OPM's authority to classify positions under 5 U.S.C. 5372 includes the authority to approve classifications.

We propose to change the text in paragraphs (e) and (f), stating that OPM has “the authority to . . . [e]nsure the independence of the administrative law judge” and that the employing agency has “[t]he responsibility to ensure the independence of the administrative law judge.” The revised text states that OPM has the authority, and the agency has the responsibility, to “[e]nsure the qualified independence of the administrative law judge, and to faithfully administer the structural protections designed to ensure the impartiality of the administrative law judge.” This is a clarifying change because the current reference to “ensuring the independence of the administrative law judge” encompasses two concepts: qualified decisional independence, and the statutory, structural protections designed to ensure judges' impartiality by limiting agency control in matters of position classification, pay, performance management, case assignment, and tenure. *See, e.g., Ramspeck v. Fed. Trial Examiners Conf.*, 345 U.S. 128 (1953).

We propose removing and reserving § 930.203 *Cost of competitive examination*, since OPM no longer conducts the examination. Under the current regulation each agency is charged a *pro rata* share of the examination cost, based on the actual number of administrative law judges the agency employs; and under OPM's Revolving Fund statute each agency is also charged a corresponding share for program administration costs (*e.g.*, for administering the ALJ Loan and Senior ALJ programs, review of position descriptions and job opportunity announcements, approval of noncompetitive actions, and FOIA / Privacy Act activity). While this funding

method for program administration must continue for the time being as a matter of appropriations law, the end of the examination has prompted OPM to rethink its funding method for the program. OPM is considering requesting the use of appropriated funds, instead of agency payments under the Revolving Fund, to fund its program costs. OPM seeks comment on the appropriate funding method and plans to amend this section after careful consideration of the feasibility of a new funding method and consideration of public comments.

In § 930.204 *Appointments and conditions of employment*, paragraph (a) is revised to make clear that ALJs are appointed on a permanent full-time basis, with the exception of appointments to the Senior ALJ Program, and to address requirements for excepted service appointments. Paragraph (a)(1) includes information on ALJ appointments under Schedule E, and paragraph (a)(2) clarifies that ALJs appointed prior to July 10, 2018, remain in the competitive service under the conditions described in § 930.201(c). Information about hiring from competitive certificates is removed.

Section 930.204(b), *Licensure*, continues the existing licensure requirement for competitive service ALJ appointments, which E.O. 13843 has now extended to excepted service as the minimum standard for ALJ appointments. New § 930.204(c) sets forth the qualification requirements for competitive service and excepted service ALJs. Paragraph (c)(1) addresses the qualifications for competitive service ALJs. OPM is retaining this information, even though E.O. 13843 does not permit new competitive service appointments, because it may be relevant to reconstructing past selections. Paragraph (c)(2) addresses the agency-specific requirements permitted by E.O. 13843 for excepted appointments. Existing provisions are renumbered accordingly.

Current § 930.204(g), *Reinstatement*, is proposed to be redesignated and recaptioned as § 930.204(j) *Appointment of a former administrative law judge*. The proposed revisions to paragraph (j) make clear that any reappointments of ALJs must be made under Schedule E of part 213 in the excepted service. Current § 930.204(h) – *Transfer*, is proposed to be redesignated as § 930.204(k) and recaptioned as *Movement between agencies*. The proposed revisions to paragraph (k) make clear that any movements of ALJs between agencies must be made to positions under Schedule E of part 213 in the excepted service in the gaining agency. The proposed revisions to this paragraph also require that the hiring agency inform an ALJ that such a move will place him or her in the excepted service, and requires the gaining agency to obtain a written statement from the ALJ that the ALJ understands he or she will be leaving the competitive service for an appointment in the excepted service.

Proposed § 930.204(g), *Promotion to a higher level*, is currently § 930.204(e). The text is amended to address promotions of excepted-service ALJs, including application of agency policies and the need to document agency head approval in a request to OPM; and to ensure that incumbent ALJs have an opportunity to be considered for promotion to higher-level positions when the agency considers external applicants.

Reclassification of ALJs is addressed in proposed § 930.204(h).

Reassignment of ALJs, currently addressed in § 930.204(f), is addressed in proposed § 930.204(j). The text is amended to explain the circumstances when an agency's request to OPM for approval of the reassignment must document that the head of the requesting agency approved it.

Paragraph (l) is added to § 930.204 to address recruitment and vacancy announcements.

The proposed rule amends § 930.205, *Administrative law judge pay system*, by including a statement that makes clear this section applies to ALJ positions in both the competitive and excepted services. The proposed rule modifies paragraph (b) by removing the reference to ALJ positions “filled through a competitive examination,” and replacing it with the words “at the entry level.” The proposed rule amends paragraph (f)(2)(i) by removing the words “who is within reach for appointment from an administrative law judge certificate of eligibles” and replacing them with “who meets the minimum qualification and licensure requirement in paragraph (b) and any agency-specific requirements established under paragraph (c)(2).” The proposed rule amends paragraph (f)(2)(ii) by removing the words “who is eligible for reinstatement” and replacing them with “who is eligible for appointment under Schedule E and meets the minimum qualification and licensure requirement in paragraph (b) and any agency-specific requirements established under paragraph (c)(2).”

The proposed rule modifies § 930.206, *Performance rating and awards*, by inserting the words “in the competitive or excepted service.” Paragraph (b) is proposed to be modified by adding 5 U.S.C. 4505, 4505a, 5379, 5753, and 5754 to the list of provisions under which ALJs may not be granted “any monetary or honorary award, incentive, or similar payment.”

The proposed rule modifies § 930.207, *Details and assignments to other duties within the same agency*, to clarify that details that will last more than 120 days, and details exceeding more than a total of 120 days in a 12-month period, require OPM approval regardless of whether the ALJs are in the competitive or excepted service.

The proposed rule modifies § 930.208, *Administrative law judge loan program-detail to other agencies*, to make clear that OPM administers the ALJ loan program for loans/details of an ALJ in both the competitive and excepted services. The proposed rule also adds two new

paragraphs to § 930.208. New paragraph (e) requires the loaning agency to furnish OPM with documentation stating that the loaned ALJ's appointment was originally made, approved, or later ratified by the head of the agency. New paragraph (f) similarly requires the receiving agency of a loaned ALJ to provide documentation to OPM, as soon as practicable, stating that the head of the agency made, approved, or ratified the loan of the ALJ.

The proposed rule modifies several provisions in § 930.209, *Senior Administrative Law Judge Program*. The proposed rule modifies paragraph (b)(2) by removing the current language and replacing it with a reference to the licensure, qualification, and vetting requirements prescribed under § 930.204(b) through (g). The proposed rule amends paragraph (c) by adding the phrase "under Schedule E of § 213.3501 of this chapter" to make clear that reemployed ALJ annuitants are appointed to positions in the excepted service. The proposed rule amends paragraph (d) to specify that an agency's request to OPM for a senior ALJ must document that the appointment will be made or approved by the head of the requesting agency.

OPM is proposing to amend § 930.210, *Reduction in force*. ALJs serving in Schedule E appointments in the excepted service will be subject to the provisions of 5 CFR part 351 specific to excepted service employees. ALJs in the competitive service remain subject to the provisions of 5 CFR part 351 specific to competitive service employees. Thus, the existing rule makes clear that for RIF purposes agencies use competitive service procedures for ALJs in the competitive service and excepted service procedures for ALJs in the excepted service to determine who will remain in their current positions. In either case, the rule makes clear that an agency may not use performance as a factor for purposes of retention standing in subpart E of 5 CFR part 351.

The proposed rule also requires agencies to establish procedures for placement assistance for ALJs reached in an agency's RIF. Agencies are required to establish a priority reemployment

list and provide consideration to ALJs on its priority reemployment list before it may consider candidates on its regular employment lists, with certain exceptions. This will replace the current procedure under which OPM maintains a central, government-wide priority referral list. The agency-specific approach we are proposing is more in keeping with the excepted hiring model established by E.O. 13843. There are currently no names on the OPM list, so no individuals will be adversely affected by this change.

These new placement procedures will apply to ALJs in positions in both the competitive and the excepted service. However, the proposed rule also clarifies that displaced competitive service ALJs also will be eligible for consideration for non-ALJ competitive service positions pursuant to 5 CFR part 330, subpart B.

Lastly, OPM proposes to amend § 930.211, *Actions against administrative law judges*. The proposed rule amends paragraph (b)(4) to reference the use of notice leave, investigative leave, or administrative leave under the Administrative Leave Act of 2016, and amends paragraph (c) to remove a reference to actions taken under 5 CFR part 731.

Regulatory Flexibility Act

I certify that this regulation will not have a significant impact on a substantial number of small entities because it applies only to Federal agencies and employees.

E.O. 13563 and E.O. 12866, Regulatory Review

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and

of promoting flexibility. This rule has been designated a “significant regulatory action,” under Executive Order 12866 and has been reviewed by OMB.

Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs

This proposed rule is not expected to be subject to the requirements of E.O. 13771 (82 FR 9339, February 3, 2017) because it is expected to impose no more than de minimis costs.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any year and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

E.O. 13132, Federalism

This regulation will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant preparation of a Federalism Assessment.

E.O. 12988, Civil Justice Reform

This regulation meets the applicable standard set forth in section 3(a) and (b)(2) of Executive Order 12988.

Congressional Review Act

This action pertains to agency management, personnel, and organization and does not substantially affect the rights or obligations of nonagency parties and, accordingly, is not a

“rule” as that term is used by the Congressional Review Act (Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA)). Therefore, the reporting requirement of 5 U.S.C. 801 does not apply.

Paperwork Reduction Act

This rule does not impose any new reporting or record-keeping requirements subject to the Paperwork Reduction Act.

List of Subjects

5 CFR Part 212, 213, 302, and 930

Government employees.

Office of Personnel Management.

Alexys Stanley,
Regulatory Affairs Analyst.

Accordingly, the Office of Personnel Management proposes to amend title 5, Code of Federal Regulations parts 212, 213, 302, and 930 as follows:

PART 212 – COMPETITIVE SERVICE AND COMPETITIVE STATUS

1. Revise the authority citation for part 212 to read as follows:

Authority: 5 U.S.C. 1302, 3301, 3302; E.O. 10577, 3 CFR, 1954-1958 Comp., p. 218; E.O. 13843, 83 FR 32755; 5 CFR part 6.

Subpart D—Effect of Competitive Status on Position

2. Amend § 212.401 by revising paragraph (b) to read as follows:

§ 212.401 Effect of competitive status on the position.

* * * * *

(b) An employee in the competitive service at the time the employee's position is first listed under Schedule A, B, C, or E remains in the competitive service while the employee occupies that position.

PART 213 – EXCEPTED SERVICE

3. Revise the authority citation for part 213 to read as follows:

Authority: 5 U.S.C. 3161, 3301 and 3302; E.O. 10577, 3 CFR 1954-1958 Comp., p. 218; E.O. 13562, 3 CFR, 2010 Comp., p. 291; E.O. 13843, 83 FR 32755; 5 CFR part 6; Sec. 213.101 also issued under 5 U.S.C. 2103. Sec. 213.3102 also issued under 5 U.S.C. 3301, 3302, 3307, 8337(h), and 8456; E.O. 13318, 3 CFR 1982 Comp., p. 185; 38 U.S.C. 4301 et seq.; Pub. L. 105-339, 112 Stat 3182-83; E.O. 13162; E.O. 12125, 3 CFR 1979 Comp., p. 16879; and E.O. 13124, 3 CFR 1999 Comp., p. 31103; and Presidential Memorandum—Improving the Federal Recruitment and Hiring Process (May 11, 2010).

Subpart A – General Provisions

4. Amend § 213.102 by revising the heading and paragraph (b)(3)(i) to read as follows:

§ 213.102 Identification of Schedule A, B, C, D, or E.

* * * * *

(b)* * *

(3)(i) Upon determining that any position or group of positions, as defined in §302.101(c), should be excepted indefinitely or temporarily from the competitive service, the Office of Personnel Management will authorize placement of the position or group of positions into Schedule A, B, C, D, or E, as applicable. Unless otherwise specified in a particular appointing authority, an agency may make Schedule A, B, C, or, D appointments on either a permanent or nonpermanent basis, with any appropriate work schedule (i.e., full-time, part-time, seasonal, on-

call, or intermittent). An agency must make Schedule E appointments on a permanent basis, in accordance with part 930.

* * * * *

5. Amend § 213.103 by revising the heading and paragraph (a) to read as follows:

§ 213.103 Publication of excepted appointing authorities in Schedules A, B, C, D, and E.

(a) Schedule A, B, C, D, and E appointing authorities available for use by all agencies will be published as regulations in the Federal Register and the Code of Federal Regulations.

* * * * *

Subpart C – Excepted Schedules

6. At the end of subpart C, add undesignated heading and § 213.3501 to read as follows:

Schedule E

§ 213.3501 Positions of administrative law judge appointed under 5 U.S.C. 3105.

Agency heads may make appointments under this section to positions of administrative law judge appointed under 5 U.S.C. 3105. Conditions of good administration warrant that the position of administrative law judge be placed in the excepted service. Positions filled under this authority are excepted from the competitive service and constitute Schedule E. All appointments of administrative law judges made on or after July 10, 2018 must be made under Schedule E in accordance with the provisions of subpart B of part 930 of this chapter.

PART 302 – EMPLOYMENT IN THE EXCEPTED SERVICE

7. Revise the authority citation for part 302 to read as follows:

Authority: 5 U.S.C. 1302, 3301, 3302, 3317, 3318, 3320, 8151, E.O. 10577 (3 CFR 1954-1958 Comp., p. 218); E.O. 13843, 83 FR 32755; 5 CFR part 6; §302.105 also issued under 5 U.S.C. 1104, Pub. L. 95-454, sec. 3(5); §302.501 also issued under 5 U.S.C. 7701 *et seq.*

Subpart A – General Provisions

8. Amend § 302.101 by adding paragraph (c)(12) to read as follows:

§302.101 Positions covered by regulations.

* * * * *

(c)* * *

(12) Administrative law judge positions filled through appointment under 5 U.S.C. 3105 after July 9, 2018.

PART 930 – PROGRAMS FOR SPECIFIC POSITIONS AND EXAMINATIONS

(MISCELLANEOUS)

Subpart B – Administrative Law Judge Program

9. Revise the authority citation for part 930, subpart B to read as follows:

Authority: 5 U.S.C. 1103(a)(5)(A), 1305, 3105, 3301, 3304, 3323(b), 3344, 3502, 4301(2)(D), 4305, 5372, 7521; E.O. 10577, 3 CFR, 1954–1958 Comp., p. 219; E.O. 13843, 83 FR 32755; 5 CFR parts 2, 5, 6.

10. Revise § 930.201 to read as follows:

§ 930.201 Coverage.

(a) This subpart applies to individuals appointed under 5 U.S.C. 3105 as administrative law judges for proceedings required to be conducted in accordance with 5 U.S.C. 556 and 557. This subpart applies to administrative law judge positions in both the competitive and excepted services unless otherwise stated.

(b) On or after July 10, 2018, appointments of individuals to administrative law judge are made under Schedule E of the excepted service in § 213.3501 of this chapter.

(c) Individuals appointed to administrative law judge positions prior to July 10, 2018, remain in the competitive service as long as they remain in their positions, including when they are subject to actions within their agencies that do not result in a new appointment (including details, assignments, reassignments, pay adjustments, and promotions under this subchapter). No new appointments of administrative law judges to the competitive service may be made after July 9, 2018. Except as otherwise stated in this subpart, the rules and regulations applicable to positions in the competitive service apply to competitive service administrative law judge positions.

(d) The title “administrative law judge” is the official title for an administrative law judge position in both the competitive and excepted services. Each agency must use only this title for personnel, budget, and fiscal purposes.

(e) OPM does not hire administrative law judges for other agencies, but has the authority to:

(1) Assure that decisions concerning the appointment, pay, and tenure of administrative law judges in the competitive and excepted services are consistent with applicable laws and regulations;

(2) Establish classification standards and approve classification of administrative law judge positions;

(3) Approve noncompetitive personnel actions for administrative law judges, including but not limited to promotions, restorations, and reassignments;

(4) Approve personnel actions related to pay for administrative law judges under § 930.205(c), (f)(2), (g), and (j);

(5) Approve an intra-agency detail, or an assignment of an administrative law judge to a non-administrative law judge position that lasts more than 120 days or when an administrative law judge cumulates a total of more than 120 days for more than one detail or assignment within the preceding 12 months;

(6) Arrange the temporary detail (loan) of an administrative law judge from one agency to another under the provisions of the administrative law judge loan program in §930.208;

(7) Arrange temporary reemployment of retired administrative law judges to meet changing agency workloads under the provisions of the Senior Administrative Law Judge Program in § 930.209;

(8) Promulgate regulations for purposes of sections 3105, 3344, 4301(2)(D) and 5372 of title 5, U.S.C.; and

(9) Ensure the qualified independence of the administrative law judge, and to faithfully administer the structural protections designed to ensure the impartiality of the administrative law judge.

(f) An agency employing administrative law judges under 5 U.S.C. 3105 has:

(1) The authority to appoint as many administrative law judges as necessary for proceedings conducted under 5 U.S.C. 556 and 557;

(2) The authority to assign an administrative law judge to cases in rotation so far as is practicable;

(3) The responsibility to confirm that at the time of appointment administrative law judges meet the minimum qualification and licensure requirement under § 930.204(b) and any agency-specific requirements identified by the agency under § 930.204(c);

(4) The responsibility to establish and maintain an ALJ priority referral program under § 930.210(c);

(5) The responsibility to ensure the qualified independence of the administrative law judge, and to faithfully administer the structural protections designed to ensure the impartiality of the administrative law judge; and

(6) The responsibility to obtain OPM's approval before taking any of the personnel actions described in paragraphs (e)(3) through (7) of this section.

§ 930.203 [Removed and Reserved]

11. Remove and reserve § 930.203:

12. Revise § 930.204 to read as follows:

§ 930.204 Appointments and conditions of employment.

(a) *Appointment.* Administrative law judges are appointed on a permanent full-time basis with the exception of appointments to the Senior Administrative Law Judge Program under § 930.209.

(1) *Excepted service.* (i) On and after July 10, 2018, an agency head may appoint an individual to an administrative law judge position made under Schedule E in § 213.3501 of this chapter.

(ii) An excepted service appointment as an administrative law judge is made in accordance with such regulations and practices as the head of the agency concerned finds necessary, provided that the appointee must meet the licensure, qualification, and vetting requirements described in paragraphs (b) through (d) of this section.

(iii) An excepted service appointment as an administrative law judge is not subject to a trial period.

(2) *Competitive service.* (i) Administrative law judges appointed prior to July 10, 2018, are employees in the competitive service and remain in the competitive service under the conditions described in § 930.201(c).

(ii) An administrative law judge in the competitive service who received a career appointment is exempt from the probationary period requirements under part 315 of this chapter.

(iii) A competitive service appointment as an administrative law judge is subject to the licensure, qualification, and vetting requirements described in paragraphs (b) through (d) of this section.

(iv) An administrative law judge serving in the competitive service who is appointed by another agency as an administrative law judge on or after July 10, 2018, or who separates from service and is reappointed as an administrative law judge on or after July 10, 2018, shall be appointed in the excepted service.

(b) *Licensure requirements.* At the time of appointment as an administrative law judge, the individual, other than an incumbent administrative law judge, must possess a professional license to practice law and be authorized to practice law under the laws of a State, the District of Columbia, the Commonwealth of Puerto Rico, or any territorial court established under the United States Constitution. Judicial status is acceptable in lieu of “active” status in States that prohibit sitting judges from maintaining “active” status to practice law. Being in “good standing” is also acceptable in lieu of “active” status in States where the licensing authority considers “good standing” as having a current license to practice law.

(c) *Qualification requirements.* (1) At the time of a competitive service appointment of an administrative law judge, the individual must meet qualification standards prescribed by OPM under Civil Service Rule II (as codified in § 2.1 of this chapter).

(2) At the time of an excepted service appointment as an administrative law judge, the individual must meet additional requirements for appointment, as appropriate, prescribed by the appointing agency under Civil Service Rule VI (as codified in § 6.3 of this chapter). Any such agency-specific requirements must be provided to potential applicants.

(d) *Vetting requirements.* (1) Applicants and appointees for the position of administrative law judge, and incumbent administrative law judges, are subject to the applicable personnel vetting standards and guidelines prescribed for employment in the Executive branch, including for:

(i) Eligibility for access to classified information or employment in a sensitive position, under Executive Orders 12968 and 13467, as amended, as implemented through standards and guidelines prescribed by the Office of the Director of National Intelligence;

(ii) Suitability for employment in the competitive service under executive orders 13467 and 13488, as amended, Civil Service Rules II and V (as codified in §§ 2.1 and 5.2 of this chapter), and part 731 of this chapter;

(iii) Fitness for employment in the excepted service under Executive Orders 13467 and 13488, as amended, and Civil Service Rules II, V, and VI (as codified in §§ 2.1, 5.2, and 6.3 of this chapter); and

(iv) Eligibility for a personal identity verification credential under Executive Order 13467, as amended, as implemented through standards and guidelines prescribed by OPM.

(2) An adverse action against an administrative law judge based on an unfavorable vetting determination must follow the procedures in § 930.211(a), unless one of the exceptions in § 930.211(c) applies.

(e) Appointment of incumbents of newly classified administrative law judge positions. An agency head may appoint an incumbent employee to an administrative law judge position under Schedule E authority at § 213.3501 of this chapter if:

(1) The employee is serving in the position when it is classified as an administrative law judge position on the basis of legislation, Executive Order, or a decision of a court; and

(2) The agency determines the employee meets the licensure requirement in paragraph (b) of this section and any agency-specific requirements established under paragraph (c)(2) of this section.

(f) Appointment of an employee from a non-administrative law judge position. An agency head may appoint an employee who is serving in a position other than an administrative law judge position to an administrative law judge position under Schedule E of the excepted service at § 213.3501 of this chapter if that employee meets the licensure requirement in paragraph (b) of this section and any agency-specific requirements established under paragraph (c)(2) of this section.

(g) Promotion to a higher level. (1) Except as otherwise stated in this paragraph, 5 CFR part 335 applies in the promotion of administrative law judges in the competitive service.

(2) An agency may promote an administrative law judge in the excepted service according to the agency's excepted service policies on promotion, subject to the administrative law judge pay provisions at § 930.205.

(3) An agency must give its administrative law judges, whether in the competitive or excepted service, the opportunity to be considered for promotion to a higher level when it seeks candidates from outside the agency for the higher-level position.

(4) The agency's request for OPM to approve the action under § 930.201(e)(3) must document that the agency head approved the promotion.

(h) *Reclassification.* To reclassify an administrative law judge position at a higher level, the agency must submit a request to OPM. If OPM approves the higher level classification, OPM will direct the promotion of the administrative law judge occupying the position prior to the reclassification.

(i) *Reassignment.* (1) The agency's request for OPM to approve the action under § 930.201(e)(3) must document a bona fide management reason for the reassignment.

(2) Where a reassignment would involve a significant position change, such as reassignment to a different bureau within the same department, or a reassignment to perform a significantly different kind of work, the agency's request for OPM to approve the action under § 930.201(e)(3) must document that the agency head approved the reassignment.

(j) *Appointment of a former administrative law judge.* An agency head may appoint a former administrative law judge under excepted service Schedule E authority at § 213.3501 of this chapter who was originally appointed pursuant to 5 U.S.C. 3105 and who meets the licensure requirement in paragraph (b) of this section and any agency-specific requirements established under paragraph (c)(2) of this section.

(k) *Movement between agencies.* (1) An agency head may appoint under excepted service Schedule E authority at § 213.3501 of this chapter an administrative law judge employed by another agency, subject to the administrative law judge pay provisions at § 930.205, who meets any agency-specific requirements established under paragraph (c)(2) of this section. Incumbent administrative law judges are not subject to the licensure requirement in paragraph (b) of this section when moving to another agency.

(2) When an administrative law judge serving in a competitive service position is selected for an excepted appointment at another agency, the hiring agency must:

(i) Inform the employee that, because the position is in the excepted service, it may not be filled by a competitive service appointment, and that acceptance of the proposed appointment will take him/her out of the competitive service; and

(ii) Obtain from the employee a written statement that he/she understands he/she is leaving the competitive service voluntarily to accept an appointment in the excepted service.

(l) *Recruitment.* Agencies must recruit and announce vacancies for administrative law judge positions in a manner to attract a sufficient pool of qualified applicants, consistent with the merit system principles.

(m) *Conformity.* Agency actions under this section must be consistent with § 930.201(f).

13. Amend § 930.205 by adding a sentence to the beginning of paragraph (a), and by revising paragraphs (b) and (f)(2) to read as follows:

§930.205 Administrative law judge pay system.

(a) The administrative law judge pay system, administered by OPM, applies to both competitive service and excepted service administrative law judges. * * *

(b) Pay level AL-3 is the basic pay level for administrative law judge positions filled at the entry level in the competitive and excepted services.

* * * * *

(f) * * *

(2) With prior OPM approval, an agency may pay the rate of pay that is next above the applicant's existing pay or earnings up to the maximum rate F. The agency may offer a higher than minimum rate to:

(i) An administrative law judge applicant with superior qualifications (as defined in § 930.202) who meets the licensure requirement in § 930.204(b) and any agency-specific requirements established under § 930.204(c)(2); or

(ii) A former administrative law judge with superior qualifications who is eligible for appointment under Schedule E and meets the licensure requirement in § 930.204(b) and any agency-specific requirements established under § 930.204(c)(2).

* * * * *

14. Revise § 930.206 to read as follows:

§ 930.206 Performance rating, awards, and incentives.

(a) An agency may not rate the job performance of an administrative law judge in the competitive or excepted service.

(b) An agency may not grant any monetary or honorary award, incentive, or similar payment under 5 U.S.C. 4502, 4503, 4504, 4505, 4505a, 5379, 5753, or 5754, or under any other similar authority to an administrative law judge in the competitive or excepted service.

15. In § 930.207, revise paragraph (a) to read as follows:

§ 930.207 Details and assignments to other duties within the same agency.

(a) An agency may detail an administrative law judge from one administrative law judge position to another administrative law judge position within the same agency in accordance with 5 U.S.C. 3341. All details that will last more than 120 days, and details exceeding more than a total of 120 days in a 12-month period, require OPM approval regardless of whether the administrative law judges are in the competitive or excepted service.

* * * * *

16. In § 930.208, revise paragraph (a) and add paragraphs (e) and (f) to read as follows:

§ 930.208 Administrative Law Judge Loan Program—detail to other agencies.

(a) In accordance with 5 U.S.C. 3344, OPM administers an Administrative Law Judge Loan Program that coordinates the loan/detail of an administrative law judge whether in the competitive or excepted service from one agency to another. An agency may request from OPM the services of an administrative law judge if the agency is occasionally or temporarily insufficiently staffed with administrative law judges, or an agency may loan the services of its administrative law judges to other agencies if there is insufficient work to fully occupy the administrative law judges' work schedule.

* * * * *

(e) The department or agency that employs the administrative law judge to be loaned must furnish OPM with documentation that the administrative law judge's appointment was originally made, approved, or later ratified, by the head of the employing agency.

(f) Upon accepting the services of a loaned administrative law judge, the department or agency must, as soon as practicable, furnish OPM with documentation that the head of the receiving agency has made, approved, or ratified, the loan of the administrative law judge.

17. Amend § 930.209 by revising paragraphs (b)(2), (c), (d)(3) and (4), and adding paragraphs (d)(5) and (h) to read as follows:

§ 930.209 Senior Administrative Law Judge Program.

* * * * *

(b) * * *

(2) The licensure, qualification, and vetting requirements prescribed under § 930.204(b) through (d); and

* * * * *

(c) Under the Senior Administrative Law Judge Program, OPM authorizes agencies that have temporary, irregular workload requirements for conducting proceedings in accordance with 5 U.S.C. 556 and 557 to temporarily reemploy administrative law judge annuitants under Schedule E, § 213.3501, of this chapter. If OPM is unable to identify an administrative law judge under § 930.208 who meets the agency's qualification requirements, OPM will approve the agency's request.

(d) * * *

(3) Specify the tour of duty, location, period of time, or particular cases(s) for the requested reemployment;

(4) Describe any special qualifications the retired administrative law judge possesses that are required of the position, such as experience in a particular field, agency, or substantive area of law; and

(5) Document that the appointment will be made or approved by the agency head.

* * * * *

(h) Senior administrative law judges appointed prior to July 10, 2018, remain in the competitive service for the duration of their appointment, including any extension periods authorized by OPM.

18. Amend § 930.210 by revising paragraphs (a) and (c) to read as follows:

§ 930.210 Reduction in force.

(a) *Retention preference regulations.* Except as modified by this section, the reduction in force regulations in part 351 of this chapter apply to administrative law judges in the competitive and excepted services.

* * * * *

(c) *Placement assistance.* (1) An administrative law judge in the competitive service who is reached in an agency's reduction in force and receives a notification of separation or is furloughed for more than 30 days is eligible for placement assistance for any position in the competitive service to which qualified under the agency's reemployment priority list (RPL) established and maintained in accordance with subpart B of part 330 of this chapter, as well as the agency's administrative law judge priority reemployment list established under paragraph (c)(3) of this section.

(2) An administrative law judge in the excepted service who is reached in an agency's reduction in force and receives a notification of separation or is furloughed for more than 30 days is eligible for placement assistance under the agency's administrative law judge priority reemployment list established and maintained in accordance with paragraph (c)(3) of this section.

(3) An agency must establish an administrative law judge priority reemployment list whenever an administrative law judge, in the competitive or excepted service, has been furloughed for more than 30 days or separated from a continuing appointment without delinquency or misconduct, and applies for reemployment.

(i) Candidates are entered on the priority reemployment list in the geographic areas where they were separated unless the agency elects to provide broader consideration.

(ii) Candidates remain on the list for two (2) years unless the agency elects to provide a longer period of eligibility.

(iii) Termination of eligibility on the agency's priority reemployment list takes place when an administrative law judge submits a written request to terminate eligibility, accepts a permanent full-time administrative law judge position, or declines one full-time employment

offer as an administrative law judge at or above the level held when reached for reduction in force at the geographic location where he or she was separated unless the agency elects to provide broader consideration.

(4) An agency must consider administrative law judges on its priority reemployment list before it may use other selection methods, except as described in this paragraph (c)(4). When a qualified administrative law judge is available on the priority reemployment list, the agency may appoint an individual who is not on the priority reemployment list, or who has lower standing on that list, *only* when the agency can demonstrate that the individual possesses experience and qualifications superior to any other available displaced administrative law judge on the agency's priority reemployment list.

(5) A former administrative law judge selected from the priority reemployment list is appointed under Schedule E in the excepted service regardless of whether the administrative law judge served previously in the competitive service.

19. Amend § 930.211 by revising paragraphs (b)(4) and (c) as follows:

§ 930.211 Actions against administrative law judges.

* * * * *

(b) * * *

(4) If the alternatives in paragraphs (b)(1) through (3) of this section are not available, the agency may consider placing the administrative law judge in administrative leave, or, when regulations implementing the Administrative Leave Act of 2016, section 1138 of Public Law 114-328, have been finalized and become effective, in notice leave, investigative leave, or administrative leave status, as appropriate.

(c) *Exceptions from procedures.* The procedures in paragraphs (a) and (b) of this section do not apply:

(1) In making dismissals or other actions made by agencies in the interest of national security under 5 U.S.C. 7532;

(2) To reduction in force actions taken by agencies under 5 U.S.C. 3502; or

(3) In any action initiated by the Office of Special Counsel under 5 U.S.C. 1215.

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